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No. 193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

STEPHEN P. PIGA,
SIDNEY STRUBLE,
ELIAS MESSING,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Philip H. Simon, respectfully represents:

I. On May 7, 1940, the Grand Jury for the District of New Jersey found an indictment charging the petitioner, in one count, with violation of the Harrison Narcotic Act, 26 U. S. C. A. 2550 *et seq.*

II. On June 17, 1940, said petitioner was convicted in the United States District Court for New Jersey, after trial before the Honorable CHARLES C. WYCHE and a jury, on the single count of the aforesaid indictment. On June

18, 1940, the petitioner was sentenced to imprisonment for eighteen months.

III. The indictment charged the petitioner for an offense as follows:

> "As a physician who had duly registered and paid a special tax as required by the Harrison Narcotic Act, he did unlawfully, knowingly, feloniously and willingly sell, barter, exchange and give away to one Mildred McDermott on or about March 30, 1940, at Passaic, New Jersey, 163 one-quarter grain tablets of morphine, not in pursuance of any written order of the said Mildred McDermott on the form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, and not in good faith and not in the course of his professional practice only."

The conviction by the jury on the single count necessarily means that the jury found the petitioner guilty as charged in the indictment.

The defendant duly offered the opinion testimony of an expert medical witness, Dr. Rubin A. Gerber, to establish the medical character and symptoms of trigeminal neuralgia, for which defendant had been treating his patient, Mildred McDermott, and that morphine sulphate in the quantities prescribed and given to Mrs. McDermott were in accordance with approved medical practice. Among other things, Dr. Gerber testified that the defendant's "conduct" (in treating Mrs. McDermott) was that of an ethical practitioner (R. 11).

On cross-examination (R. 12-15) the prosecuting attorney, mistaking the purpose and effect of such testi-

mony, examined the witness regarding the defendant's "reputation" as an ethical practitioner, although the witness had not been called nor qualified as a character witness. In the course of such cross-examination, in the presence of the jury, the prosecuting attorney asked the witness:

> "*Do you know* whether or not he (defendant) had any previous police or criminal record in his community?" (R. 12) (Italics ours wherever they appear.)

Also,

> "*Doctor, would you be surprised to learn* that he (defendant) was charged in 1933 with the crime of conspiracy and that he (defendant) was charged in 1934 with having performed an abortion?" (R. 12).

While holding that Dr. Gerber was not offered as a character witness by the defendant (R. 37) nor duly qualified as such by the usual questions asked such a witness about to testify as to the defendant's character (R. 37), the Circuit Court held that the appellant put his "reputation" in issue by asking a direct question as to his "conduct" as a physician (R. 37). The jury, as the finders of the fact on the question of the ethical conduct of the doctor-defendant in diagnosing, prescribing and giving medicines to his patient, Mrs. McDermott, not only did not have the benefit of the clear direction of the Court to disregard the statements of the prosecuting attorney indicating previous charges of crime and arrest, but, even had such explicit direction been given to the jury, the effect of the particular statements and questions of the prosecuting attorney could not possibly, as a matter of law, have been erased from their minds. Upon objection by defend-

ant's counsel to the prosecuting attorney's above reference to an alleged prior arrest of the defendant as improper, the prosecuting attorney stated:

> "I admit on the question of the doctor's previous arrest I should not have shown * * *" (R. 13).

He was cut short by an objection of defendant's counsel, and the Court then said:

> "Gentlemen of the jury, you will disregard *that statement* of the United States Attorney and should not be guided by anything but the testimony in the case" (R. 13).

Immediately thereafter the jury retired from the court as directed and a colloquy ensued between counsel and the court.

The prosecuting attorney stated:

> "My question is whether or not he (witness Dr. Gerber) knew the doctor (defendant) was charged with conspiracy in 1933 and in 1934 was charged with having committed an abortion" (R. 14)

The defendant's attorney thereupon objected to the question and after discussion between the court and opposing counsel, the court ruled as follows:

> "I do not think that the question is proper, Mr. Smith (prosecuting attorney). Bring the jury back" (R. 14).

The jury returned, but were not advised by the court of its ruling as to the propriety of the question whether or not the witness, Dr. Gerber, knew that the defendant was charged with conspiracy and abortion.

IV. On the second day of the trial the jury retired for deliberation. In two and one-half hours the jury returned with the verdict of guilty. On the next day, June 18, 1940, the petitioner was sentenced to eighteen months imprisonment.

V. On September 24, 1940, the petitioner duly appealed from the aforesaid judgment of conviction to the United States Circuit Court of Appeals for the Third Circuit. On April 1, 1941, that court unanimously affirmed the conviction, an opinion being rendered by the Honorable JOHN BIGGS, JR., Circuit Judge. The opinion is printed in the record submitted herewith. (R. 33)

VI. Thereafter a petition for rehearing of said appeal was filed with the said Circuit Court of Appeals for the Third Circuit, which application was denied on the 16th day of May, 1941.

Statement of Jurisdiction.

The jurisdiction of this court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (United States Code, Title 28, Section 347(a)).

Questions Presented.

The following are the questions presented by petitioner.

I.

Was it prejudicial error for the prosecuting attorney, in an endeavor to impeach an alleged character witness, to

suggest prior charges of crimes and arrests of defendant in the presence of the jury and inquire if he knew of them?

The opinion of the United States Circuit Court of Appeals, Third Circuit, sustains the right of the prosecuting attorney, in endeavoring to impeach a character witness to suggest prior charges of crimes and arrests of defendant and the right to ask if the witness knew of them. This right and practice is not in accord with the decisions of other Circuit Courts of Appeals. The decisions of such other Circuit Courts of Appeals are, as follows:

Stewart v. *U. S.*, 104 F. (2d) 234 (App. D. C. 1939);
Filippelli v. *U. S.*, 6 F. (2d) 121 (C. C. A. 9th, 1925);
Spalitto v. *U. S.*, 39 F. (2d) 782 (C. C. A. 8th, 1930);
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Sloan v. *U. S.*, 31 F. (2d) 902 (C. C. A. 8th, (1929).

II.

Do the United States Circuit Courts of Appeals have the power to consider and review errors committed in the trial of a criminal case, even though not reserved by objection or exception, so that justice may be done and the constitutional right of the defendant to a fair trial is assured?

In so far as the opinion of the United States Circuit Court of Appeals assumes the necessity of the making of

objections and exceptions to the trial court's ruling, as a condition precedent to the right of defendant to appeal from highly prejudicial error, it is in direct conflict with the decisions of this Court, its own decisions, and decisions of other Circuit Courts of Appeal in the following cases, among others:

Wiborg v. *U. S.*, 163 U. S. 632, 658 (1896);
Clyatt v. *U. S.*, 197 U. S. 207, 221 (1905);
Crawford v. *U. S.*, 212 U. S. 183, 194 (1909);
Weems v. *U. S.*, 217 U. S. 349, 362 (1910);
Brasfield et al v. *U. S.*, 272 U. S. 448, 450 (1926);
Savage v. *U. S.*, 213 Fed. 31, 32 (C. C. A. 8th, 1914);
Skuy v. *U. S.*, 261 Fed. 316, 320 (C. C. A. 8th, 1919);
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Ayres v. *U. S.*, 58 F. (2d) 607, 609 (C. C. A. 8th, 1932);
Towbin v. *U. S.*, 93 F. (2d) 861 (C. C. A. 10th, 1938);
Crabb et al v. *U. S.*, 99 F. (2d) 325, 326 (C. C. A. 10th, 1938);
Smith v. *U. S.*, 106 F. (2d) 726, 727 (C. C. A. 4th, 1939).

Reasons for Granting the Writ.

Your petitioner respectfully urges, as will be more fully argued in the brief accompanying this petition, the

following reasons why this application for a writ of certiorari should be granted:

1. The decision of the United States Circuit Court of Appeals, Third Circuit, sustaining the right of a prosecuting attorney to attempt to impeach a character witness by suggesting prior charges of crimes or arrests of the defendant and by inquiring if the witness had knowledge thereof, is in conflict with the decisions of other Circuit Courts of Appeals.

The Supreme Court has never specifically passed upon the question of the protection to be given defendants in criminal cases, from the effect of the type of questions complained of in the instant case. Since, in criminal cases, the life and liberty of the defendant is involved, it is of paramount importance to have a determination and clarification by this Court of the rules governing and defining permissible cross examination of character witnesses, to the end that such defendants shall receive a fair trial as guaranteed by the Constitution free from the vice inherent in the instant case.

2. The decision of the United States Circuit Court of Appeals, Third Circuit, is in conflict with decisions of this Court, other United States Circuit Courts of Appeals, and the same United States Circuit Court of Appeals, Third Circuit, in so far as it is based upon the assumption that it may not review, nor consider on an appeal to it, in a criminal case, highly prejudicial errors committed in the trial court, unless reserved by objection or exception.

It was in the interest of justice that this court in *Wiborg* v. *United States,* 163 U. S. 632, 653, alleviated the strictness of the former rule and practice, that no relief what-

ever might be granted by federal appellate courts, except on recorded objections or exceptions to rulings in the trial courts. The rule set forth therein recognizing the right and duty of the appeal courts to correct such prejudicial error, in criminal cases, though no formal objection or exception were taken, has been followed by this court, other Circuit Courts of Appeals, and even the Circuit Court of Appeals, Third Circuit. However, in the instant case, said Circuit Court of Appeals for the Third Circuit, has refused to recognize such power and duty to review. The conflict thus created should at this time, be dispelled by this court.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the said United States Circuit Court of Appeals, affirming the judgment in this cause, may be reversed, and that the petitioner may have such other and further relief in the premises as this Court may deem appropriate.

Dated: New York, N. Y., June 14, 1941.

PHILIP H. SIMON,
Petitioner.

By ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

Verification for the Petition.

UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP H. SIMON being duly sworn, says:

I am the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

PHILIP H. SIMON.

Sworn to before me this
14th day of June, 1941.

FREDERICK GRIFFIN
Frederick Griffin

Notary Public, New York County
N. Y. Co. Clks. No. 346 Reg. No. 2G351
Kings Co. Clks. No. 169 Reg. No. 2254
Bronx Co. Clks. No. 45 Reg. No. 186G42
Queens Co. Clks. No. 811 Reg. No. 2523
Commission expires March 30, 1942

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS.

Sworn to before me this
14th day of June, 1941.

FREDERICK GRIFFIN
Frederick Griffin

Notary Public, New York County
N. Y. Co. Clks. No. 346 Reg. No. 2G351
Kings Co. Clks. No. 169 Reg. No. 2254
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Brief in Support of Petition for Certiorari.

Jurisdiction.

The jurisdiction of this Court is invoked under provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347(a)).

Statement of the Case.

The facts have been set forth forth in the foregoing petition.

SUMMARY OF ARGUMENT.

POINT I.

It was prejudicial error for prosecuting attorney, in endeavoring to impeach a character witness, to suggest

and impute existence of prior charges of crimes and arrests of the defendant and to ask if the witness "knew" of them.

POINT II.

In a criminal case, the United States Circuit Court of Appeals has the power to review errors committed in the trial court, even though not reserved by objection, exception, or motion for mistrial.

ARGUMENT.

POINT I.

It was prejudicial error for prosecuting attorney, in endeavoring to impeach a character witness, to suggest and impute existence of prior charges of crimes and arrests of the defendant and to ask if the witness "knew" of them.

Assuming *arguendo,* that Dr. Gerber had been duly qualified as a character witness by the defendant who called him, the matters disclosed by the questions asked him on cross-examination by the prosecuting attorney in seeking to impeach him, were improper, highly prejudicial, deprived defendant of a fair trial and constituted reversible error.

The first improper question on cross-examination was:

> "*Do you know* whether or not he (defendant) had any previous police or criminal record in his community?" (R. 36)

This question assumes the existence of a previous police or criminal record of the defendant as a fact, although there is no such factual evidence in the entire record. The question would have been proper had it been addressed rather to the defendant's *reputation* in the community, and phrased, thus:

> "*Have you heard* that the defendant has a previous police or criminal record?"

In *Stewart* v. *United States,* 104 F. (2d) 234 (App. D. C., 1939), the Court said:

> "Since, however, the question of the extent of cross-examination of character witnesses so frequently arises in this jurisdiction, we deem it not improper to state more definitely, perhaps, than has been done before what we believe to be the correct rule in relation thereto. The same rule which excludes independent evidence of the former criminal record of an accused confines character evidence to his general reputation. When evidence of good character is offered, cross-examination of the character witness has a legitimate purpose in testing the grounds of his belief and, since the only admissible evidence of good character is what people generally, who know the accused, think about him, the prosecuting attorney may ask if the witness has heard of conduct negativing a favorable reputation. For the word 'character' in this sense means reputation as distinguished from disposition. By this token, the witness' knowledge of particular acts is not admissible to approve character. Consequently the witness should not be asked, either upon direct or cross-examination, if he knows of particular incidents in the career of the accused. In other words, the witness on cross-examination should be asked only—'Have you heard?'—not—'Do you know?'"

See also:

Filippelli v. *U. S.*, 6 F. (2d) 121 (C. C. A. 9th, 1925).

In the *Filippelli* case, *supra,* the prosecuting attorney asked:

> "If you had heard he had been arrested frequently * * * you would not think his reputation was good?"

The Court condemned this question because it assumed that the plaintiff in error had been arrested a number of times. The court said:

> "If such were the fact, it was misconduct to call the matter to the attention of the jury, because the Government would not be permitted to prove it, and if such were not the fact, the misconduct was graver still."

See also:

Spalitto v. *U. S.*, 39 F. (2d) 782 (C. C. A. 8th, 1930);

Sloan v. *U. S.*, 31 F. (2d) 902, 905, 906 (C. C. A. 8th, 1929).

As stated by Wigmore on Evidence, 3rd Edition, Section 988, at page 618:

> "On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his mind.
>
> "It is to be noted that the injury is always directed to the witness' knowledge of the disparaging rumor

> as negativing the reputation. There must be no question as to the fact of the misconduct, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce."

The serious objection, then, to the type of question asked in the instant case is that this method of inquiry or cross examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; counsel rely upon the mere putting of the question, not caring that it is answered negatively, to convey their covert insinuation.

The next improper and prejudicial question asked the witness by the prosecuting attorney on cross examination was:

> "Doctor, would you be surprised to learn that he (defendant) was charged in 1933 with the crime of conspiracy, and that he (defendant) was charged in 1934 with having performed an abortion?" (R. 36)

The purpose of the foregoing question is, not to endeavor to impeach the witness, but to show in an indirect way, that the defendant was previously charged with the crimes of conspiracy and abortion. What other purpose could this question have served? What other purpose could the prosecuting attorney have had in mind in asking it? He was not interested to learn whether or not such knowledge would or would not surprise the witness. The surprise of the witness was of no legal importance. Naturally, the jury would infer from the question that such charges of crime had been made against the defendant.

When confronted by a similar question, the Circuit Court of Appeals, Fourth Circuit (1932), in *Newman* v. *United States,* 289 Fed. 712, 717, said:

> "Nor can it be seriously doubted that what occurred in reference to abortions and dispensing of drugs generally, regardless of the court's action in striking out such evidence, did not likewise prejudicially affect the jury in their consideration of the case properly against the accused, * * *"

See also:

Glover v. *U. S.,* 147 Fed. 426, 429, 430 (C. C. A. 8th, 1906);
Coyne v. *U. S.,* 246 Fed. 120 (C. C. A. 5th, 1917);
Weiner v. *U. S.,* 20 F. (2d) 522 (C. C. A. 3rd, 1927);
Coulston v. *U. S.,* 51 F. (2d) 178, 181, 182 (C. C. A. 10th, 1931).

As appears above, other Circuit Courts of Appeal have recognized the vice of both of these types of question and strictly limited such questions to the one form "Did you hear" or "Have you heard" of such misconduct or acts. The Circuit Court of Appeals, Third Circuit, condoned as proper in the instant case, questions repeatedly attacked as improper by said other Circuit Courts of Appeals.

The Circuit Court of Appeals, Third Circuit, stands alone in failing to grant to defendants in criminal cases the protection due them and accorded them by the other Circuit Courts of Appeals.

See:

Pittman v. *U. S.*, 42 F. (2d) 793 (C. C. A. 8th, 1930);
Fabacher v. *U. S.*, 20 F. (2d) 736 (C. C. A. 5th, 1927);
Skuy v. *U. S.*, 261 Fed. 316 (C. C. A. 8th, 1919);
Bonbarger v. *U. S.*, 219 Fed. 841 (C. C. A. 5th, 1914);
State v. *Young*, 93 N. J. L. 396;
State v. *Bossone*, 89 N. J. L. 724, affirming 88 N. J. Law 45;
State v. *Quinlan*, 86 N. J. L. 120, aff. 87 N. J. L. 333;
Coulston v. *U. S.*, 51 F. (2d) 178 (C. C. A. 10th, 1931).

This conflict never has been, but should be dissipated by a decision of the Supreme Court.

POINT II.

In a criminal case, the United States Circuit Court of Appeals has the power and duty to review errors in the trial court, even though not reserved by objection, exception, or motion for mistrial.

In its opinion in the instant case, the Circuit Court of Appeals, Third Circuit, stated that:

> "It will be noted that the attorney for the defendant did not ask for the withdrawal of a juror and for the declaration of a mistrial and indeed did not even request that the court instruct the jury to disregard

> the question asked of Dr. Gerber as to whether or not he would be surprised to learn that the defendant had been charged with other crimes." (R. 37)

and further,

> "Moreover, as we have indicated, counsel for the defendant, beyond making an objection to the question, did nothing." (R. 38).

Its decision is thus based upon an interpretation of the law which is in conflict with decisions of this Court, other Circuit Courts of Appeals, and its own previous decisions.

It is a cardinal principle that it is the duty of the Courts and of the District Attorney to protect the innocent charged with crime, as well as to prosecute the guilty.

See

Read v. *United States,* 42 F. (2d) 636, 645 (C. C. A. 8th, 1930);
Taliaferro v. *United States,* 47 F. (2d) 699, 702 (C. C. A. 9th, 1931).

The failure of defendant's counsel to object, except, or to move for a mistrial, in the instant situation, does not deprive such defendant of his right to have these matters excluded from the jury so that defendant might have a fair and impartial trial. This is the least that must be done by the Court (*Waldron* v. *Waldron,* 156 U. S. 361 (1895)); though it is submitted that the mere asking of these questions was so highly prejudicial that even such a clear direction could not have cured the error.

Mercer v. *United States,* 14 F. (2d) 281 (C. C. A. 3rd, 1926);
Waldron v. *Waldron,* 156 U. S. 361 (1895);
Throckmorton v. *Holt,* 180 U. S. 552 (1900);
Lockhard v. *U. S.,* 35 F. (2d) 905 (C. C. A. 9th, 1929);
Holt v. *U. S.,* 94 F. (2d) 90, 94 (C. C. A. 10th, 1937);
McAffee v. *U. S.,* 105 F. (2d) 21 (App. D. C., 1939).

Nor is the defendant in a criminal case to be deprived of the right of review of such prejudicial errors in a trial Court even though objection, exception, request for a mistrial or request for an instruction to the jury is not made by his counsel.

Clyatt v. *United States,* 197 U. S. 207 (1905);
Crawford v. *United States,* 212 U. S. 183 (1909);
Weems v. *United States,* 217 U. S. 349, 362 (1910);
Brasfield, et al. v. *United States,* 272 U. S. 448, 450 (1926);
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Ayres v. *United States,* 58 F. (2d) 607, 609 (C. C. A. 8th, 1932);
Tobin v. *United States,* 93 F. (2d) 861 (C. C. A. 10th, 1938);

Crabb, et al. v. *United States,* 99 F. (2d) 325, 326 (C. C. A. 10th, 1938);
Smith v. *United States,* 106 F. (2d) 726, 727 (C. C. A. 4th, 1939).

In the above respects, the decision of the Circuit Court of Appeals, Third Circuit in the instant case should be made to conform with the decisions of this Court, the other Circuit Courts of Appeals, and its own Court.

Conclusion.

It is respectfully submitted that the questions involved in this application are of sufficient importance to require an exercise of this Court's supervisory jurisdiction by writ of certiorari.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

STEPHEN P. PIGA,
SIDNEY STRUBLE,
ELIAS MESSING,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 193

PHILIP H. SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 33–39) is reported at 119 F. (2d) 679.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1941 (R. 32, 40), and petition for rehearing was denied May 16, 1941 (R. 52). Petition for a writ of certiorari was filed June 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a character witness may be asked on cross-examination (1) if the witness knew "whether or not" the accused "had any previous police or criminal record in the community"; and (2) if he would be surprised to learn that the defendant had been twice previously charged with a crime.

STATEMENT

On May 7, 1940, an indictment in one count was returned against petitioner charging violation of the Harrison Narcotic Act, I. R. C., sec. 2554. On June 17, 1940, a verdict of guilty was returned and on the following day petitioner was sentenced to imprisonment for eighteen months (R. 8).

It is undisputed that petitioner delivered a quantity of morphine to one Mildred McDermott, an addict (R. 24, 26, 27, 29). The case turned upon whether this transaction was a sale to Mrs. McDermott as an addict, as she testified (R. 23–24), or was dispensed to her by petitioner in the regular course of professional treatment, as he contended (R. 28). There were no other witnesses to the transaction.

Petitioner called one Dr. Rubin A. Gerber, a medical expert, to describe the medical nature of trigeminal neuralgia, for which petitioner said he had been treating Mrs. McDermott. Dr. Gerber testified that morphine sulphate in the quantities prescribed and given was not inconsistent with sound medical

practice (R. 30). He was then asked if, from his observation of petitioner, his conduct was that of an ethical physician, and he replied that so far as he knew petitioner had always been "an honest gentleman, a good student, and an ethical practitioner" (R. 11–12).

On cross-examination, Dr. Gerber was asked (R. 12):

> Q. You do not know his reputation for ethical practice in the community in which he lives, do you?
>
> A. In a roundabout way, yes, I had a little opportunity to observe that through a casual consultation I had with Dr. Simon's patients in Passaic.
>
> Q. Do you know whether or not he had any previous police or criminal record in his community?
>
> A. I do not, but I am sure that he has not.
>
> Q. You were sure that he has not?
>
> A. No, I would not say that, but I am sure that he is not the type that would have.
>
> Q. Doctor, would you be surprised to learn that he was charged in 1933 with the crime of conspiracy, and that he was charged in 1934 with having performed an abortion?

Petitioner objected to this last question (R. 12), and the objection was sustained (R. 14). The witness was then asked (R. 15):

> Q. Doctor, do you know the defendant's general reputation for ethics in the community in which he lives and practices?
>
> A. I do not.

The Circuit Court of Appeals held that the questions were proper and affirmed the judgment of conviction.

ARGUMENT

1. Petitioner admits, *arguendo*,[1] that Dr. Gerber was a character witness (Pet. 14), but nevertheless contends that the prosecutor was guilty of "highly prejudicial" misconduct in asking the witness if he knew "whether or not he [the defendant] had any previous police or criminal record in his community" (R. 12). Petitioner's argument is directed chiefly to the form of the question as assuming the existence of a previous police or criminal record (Pet. 15). However, the question carries no clear inference of the existence of such a record. The witness was simply asked "Do you know *whether or not* he had any previous police or criminal record?" Plainly the form of the question is not, as petitioner contends, grammatically equivalent to "Do you know that?" and certainly is much less objectionable than to have asked him "Have you heard?" of specific acts

[1] There was some dispute below as to whether Dr. Gerber was a character witness. The Circuit Court of Appeals held that while he was not originally called and qualified as a character witness, petitioner nevertheless "chose to put his conduct as a physician in evidence" and thus opened the door to further inquiry into his reputation (R. 37). Petitioner does not challenge this ruling and predicates his entire argument on the theory that Dr. Gerber was a character witness.

of misconduct, which petitioner concedes to be proper (Pet. 15). See *Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C. 1939).[2] The reference is merely to "a police or criminal record," and escapes violation of the "rule against particular facts," which is the danger to be guarded against when testing the grounds of the witness's knowledge of the accused's reputation. III Wigmore, Evidence, 3rd ed., § 988.

2. Petitioner also predicates error upon the question asked of Dr. Gerber: "Doctor, would you be surprised to learn that he [the defendant] was charged in 1933 with the crime of conspiracy, and that he was charged in 1934 with having performed an abortion?" (R. 12). Petitioner contends that the mere asking of the question was so prejudicial that the court should have *sua sponte* declared a mistrial. The Circuit Court of Appeals rejected this contention by holding that the question was proper, and that it was not, in any event, prejudicial (R. 38–39).[3]

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[2] The cases cited by petitioner (Pet. 16) are therefore distinguishable since in each instance where a question was condemned as prejudicial to the accused there was an unmistakable inference which was inimical to his reputation.

[3] Petitioner presents an elaborate argument concerning the power of the appellate court to review the alleged error of the trial court despite his failure to move for a mistrial (Pet. 19–22). The opinion is clear, however, that the court below did not refuse to pass upon the propriety of the questions alleged to have been improper, but on the contrary, addressed itself entirely to the merits of the substantive

Petitioner asserts (Pet. 17) that the purpose of this question was not to impeach the witness, but to show in an indirect way that the defendant was previously charged with the crimes of conspiracy and abortion. We think it more probable, however, that the real purpose of this question was the entirely legitimate one of testing the basis of the witness' claimed knowledge of the reputation of the accused. If he were surprised to learn of such charges it might have reflected upon his knowledge of the defendant's reputation; and if he were not surprised, the jury might reasonably have doubted the honesty of his testimony. See III Wigmore, Evidence, 3rd ed., § 988, p. 618. Questions no less prejudicial to the accused have frequently been held to be proper.[4]

The cases cited by petitioner which deal with the propriety of interrogating a character witness as to the extent of his knowledge of the accused's reputation (Pet. 16, 18–19) present no conflict with

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problem in the case. The court's reference to petitioner's failure to pursue his objection is simply recited as evidence to show lack of substantial prejudice (R. 38–39).

[4] *United States* v. *Commerford*, 64 F. (2d) 28, 31–32 (C. C. A. 2d, 1933), certiorari denied 289 U. S. 759; *People* v. *Buchanan*, 119 Cal. App. 523, 525–528 (1932); *People* v. *Tedesco*, 1 Cal. (2d) 211 (1934); *State* v. *Shull*, 131 Ore. 224, 227–231. See also, *Reuben* v. *United States*, 86 F. (2d) 464, 467–468 (C. C. A. 7th, 1936), certiorari denied 300 U. S. 671; *Jung Quey* v. *United States*, 222 Fed. 766, 771 (C. C. A. 9th, 1915). Cf. *Chiccarello* v. *United States*, 68 F. (2d) 315 (C. C. A. 3rd, 1933); *Lisansky* v. *United States*, 31 F. (2d) 846, 851 (C. C. A. 4th, 1929), certiorari denied 279 U. S. 873.

the opinion below.[5] Each turns upon the somewhat elusive point whether the questions are directed to the end of showing the existence of prior charges against the defendant, or whether they are designed to test the character witness' knowledge of those charges as bearing upon the defendant's general reputation. See the elaborate discussion in *Spalitto* v. *United States,* 39 F. (2d) 782, 785–787 (C. C. A. 8th). Of necessity the question must turn upon the circumstances of each case. Here, the prosecutor's question was quite evidently designed to probe the extent of the witness' knowledge of the defendant's reputation. The court below found that "There is nothing in the record to indicate that the United States Attorney asked the question maliciously or in bad faith" (R. 38), and petitioner does not point to anything which shows the contrary.

3. In any event, it seems clear enough that petitioner could not have been substantially prejudiced by the questions asked of Dr. Gerber. Petitioner made no objection whatever to the first question (R. 12). And, as the court below pointed out (R. 39), the trial judge not only sustained petitioner's objection to the second question but also expressly instructed the jury to be guided only by the testimony (R. 13). Counsel for petitioner apparently

[5] Other cases cited by petitioner (Pet. 18–19) concern the impeachment of a witness by interrogating him as to his past criminal record, which, of course, is an entirely different problem. III Wigmore, Evidence, 3rd ed. § 980a.

was content, and asked neither for a mistrial nor for more specific instructions. Cf. *Little* v. *United States,* 93 F. (2d) 401, 408 (C. C. A. 8th, 1937), certiorari denied 303 U. S. 644; *People* v. *Gordan,* 103 Cal. 568, 575 (1894); *Taylor* v. *Commonwealth,* 269 Ky. 656, 662–663 (1937).

CONCLUSION

The petition for writ of certiorari presents no questions of importance nor is there any conflict of decisions. Therefore, we respectfully submit that it should be denied.

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IN THE

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PHILIP H. SIMON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

ARTHUR GARFIELD HAYS,
Solicitor for Petitioner.

STEPHEN P. PIGA,
SIDNEY STRUBLE,
ELIAS MESSING,
Of Counsel.

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PETITIONER'S REPLY BRIEF.

POINT I.

The assumption of the Prosecuting Attorney in cross-examining defendant's character witness that defendant had a police or criminal record violated the "rule against particular facts" to the substantial prejudice of the defendant.

The Prosecuting Attorney in his cross-examination of Dr. Gerber on the theory that he was a character witness for the defendant, assumed in his questions that the defendant had a "previous police or criminal record in his community"; "that he (defendant) was charged in 1933 with the crime of conspiracy and that he was charged in 1934 with having performed an abortion" (R. 12).

The respondent dismisses the matter by stating that this method of suggestion of prior crimes and police records "escapes violation of the 'rule against particular facts', which is the danger to be guarded against when testing the grounds of the witness' knowledge of the accused's reputation" (Resp. Brief, p. 5).

Obviously this is not so, since such questions assume the fact of previous police or criminal records.

Likewise, a question as to prior charges of the crimes of conspiracy and of abortion assumes such particular facts, but respondent is silent on this point in his brief.

What clearer violation of the "rule against particular facts" (see 3 Wigmore, Evidence, 3rd Ed. Section 988) could there be than that contained in these questions?

If, in a criminal trial, at a time when there is no evidence or testimony of such fact in the case, the prosecuting attorney asks defendant's witness whether or not he knew defendant had previously been charged with the crimes of conspiracy and abortion, such question necessarily assumes that such was the fact. A negative answer by the witness would not cure this violation of the "rule against particular facts", which requires direct proof of facts, not their establishment by indirection, innuendo or suggestion.

The Circuit Court of Appeals for the Third Circuit was in error in failing to rectify the substantial prejudice occasioned by these questions and its decision in this respect is in conflict with those of other Circuit Courts of Appeals and with its own later decision in *U. S.* v. *Nettl*, 121 F. (2d) 927 (C. C. A. 3rd, 1941).

POINT II.

The good or bad faith of the Prosecuting Attorney in asking questions is of no importance, if the form of such questions substantially prejudices the defendant's right to a fair and impartial trial.

Respondent, in its brief at page 7, suggests that if the Prosecuting Attorney acted in good faith in asking a question, however prejudicial to the defendant's rights to a fair trial, this would remove the sting and onus from such a question and bar the defendant from objecting thereto, even though the result was to prejudice the defendant irreparably before the jury.

The Prosecuting Attorney, at page 7 of his brief, on this point, used these words "The Court below found that 'There is nothing in the record to indicate that the United States Attorney asked the question maliciously or in bad faith' (R. 38) and petitioner does not point out anything which shows the contrary". Had the Prosecuting Attorney, in cross-examining Dr. Gerber, first asked him "Q. Doctor, do you know the defendant's general reputation for ethics in the community in which he lives and practices?" and received the answer thereto which the Doctor gave, namely, "I do not" (R. 15) *before* the prejudicial questions (R. 12-14), rather than *after* (R. 15), the good faith of the Prosecuting Attorney might be more apparent. But regardless of good or bad faith of the Prosecuting Attorney, the test should be "What will the jury infer from the objected to questions?" (R. 12, 13, 14).

In *United States* v. *Nettl*, 121 F. (2d) 927 (C. C. A., 3rd, June 23, 1941), (decided subsequent to the instant case

and the filing of the petition for certiorari herein) in reversing the judgment secured therein because of prejudicial questions asked in the court below by the Prosecuting Attorney, said at page 930:

> "It is true that some of the authorities make the curious suggestion that the matter is affected by a subjective standard applied to the District Attorney (Clark v. U. S., 57 App. D. C. 335, 23 Fed. 2d, 756; Chicago B. & O. R. Co. v. Kelly, 8 Cir. 74 Fed. 2d, 80). We cannot understand how the accused is interested in the personal character of his accuser. The prosecutor may be disciplined (Pope v. Boston & Maine RR., 79 N. H. 52, 104 A. 403). But it hurts the defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel. (Apt v. United States, 8 Cir., 13 F. 2d 126; Mercer v. United States, 3 Cir., 14 F. 2d 281; Speiller v. United States, 3 Cir., 31 F. 2d 682; Beck v. United States, 8 Cir., 33 F. 2nd 107)."

In the quotation from *People* v. *Mullings* (1890) 83 Cal. 138, 23 P. 229, 231, 17 Am. St. Rep. 223, quoted in the opinion of the Court in the *Nettl* case (*supra*), the Court stated:

> "The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense."

POINT III.

The decisions of other United States Circuit Courts of Appeals and of the said United States Circuit Court of Appeals of the Third Circuit, in *United States* v. *Nettl, supra,* are in accord with each other, but all are in conflict with the decision of the same Circuit Court of Appeals, Third Circuit, in the instant case.

At the time of the filing of the petition for a writ of certiorari herein, the decision of the United States Circuit Court of Appeals, Third Circuit, in the instant case was in conflict with the decisions of other United States Circuit Courts of Appeals on substantially the same questions of law. On June 23, 1941, subsequent to the filing of the petition for writ of certiorari herein, the United States Circuit Court of Appeals for the Third Circuit in the case of *United States* v. *Nettl, supra,* completely reversed its position and by that decision placed itself in accord with the decisions of the other United States Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals, Third Circuit, in the instant case, therefore, now, is not only in conflict with other United States Circuit Courts of Appeals, but also with a later decision of the same Circuit Court, that in the *Nettl* case, *supra.*

Respectfully submitted,

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